**PLASTECH INDUSTRIAL SYSTEMS SDN BHD** A

**v.**

**N&C RESOURCES SDN BHD & ORS**

HIGH COURT MALAYA, KUALA LUMPUR B
UMI KALTHUM ABD MAJID J
[CIVIL SUIT NO: 22IP-49-2009]
12 JULY 2013

***CIVIL PROCEDURE:*** *Judgment and orders - Ex parte order - Application to set aside - Whether judgment and order had to be served personally - Whether third defendant had constructive knowledge and notice of terms of judgment and order - Whether service on third defendant could be dispensed with - Rules of Court 2012, O. 45 r. 7(7)* C

***CIVIL PROCEDURE:*** *Contempt of court - Committal proceedings - Application to strike out - Filing affidavits to oppose application for committal proceedings - Whether ex parte order rightfully rejected* D

On 6 October 2011, the learned judge granted judgment in favour of the plaintiff against the defendants for breaching the plaintiff's copyright ('the judgment') and a further order on 25 November 2011 that the mould to be replaced with a third party ('the order'). The plaintiff filed an *ex parte* application for leave to commence committal proceedings against all the defendants for the failure to comply with the said judgment and order. On 9 August 2012, the court granted leave to commence committal proceedings against the defendants for contempt of the court's judgment and order ('*ex parte* order'). The plaintiff, on 22 August 2011, filed a substantive application for contempt of court *vide* encl. 36A. The third defendant applied *vide* encl. 72 for the *ex parte* order to be set aside and for the application for committal proceedings in encl. 36A to be struck out insofar as it related to the third defendant. The third defendant had stated two grounds to support his application, namely, (i) that the plaintiff had failed to serve the judgment and order personally on the third defendant; and (ii) that the plaintiff had failed to highlight to the court that the judgment and order was not served on the third defendant personally when the *ex parte* order was granted. E F G H

I

**Held (dismissing application in encl. 72 with costs):**

**(1)** The third defendant had constructive knowledge and notice of the terms of the judgment and order although it was not served on the third defendant personally. The constructive knowledge was evinced by the fact that the third defendant had formally applied for a stay of the judgment and set out the whole terms of the judgment on oath in his affidavit. Further, the third defendant was at all times represented by solicitors and was given legal advice on the steps of the proceedings. Hence, the third defendant's application was a mere afterthought to delay the committal proceedings against him. (para 7)

**(2)** There was no objection that the plaintiff had failed to serve the judgment and order personally on the third defendant. The third defendant had failed to inform the court during the case management in respect of encl. 36A application that the third defendant intended to set aside the *ex parte* order. Further, the third defendant had proceeded to file two applications to oppose the plaintiff's application for committal proceedings. Therefore the third defendant had waived his right to object to the *ex parte* order. (para 7)

**(3)** Order 45 r. 7(7) of the Rules of Court 2012 permitted the court to dispense with the service of a copy of an order under this rule if it thinks just to do so. Personal service of the judgment and the order on the third defendant was dispensed with in view of the third defendant's obvious earlier knowledge of them when he affirmed his affidavit dated 13 October 2011. (para 7)

**Case(s) referred to:**
*Madlis Azid & Ors v. Chua Yung Kim & Ors [2013] 2 CLJ 110 HC* ***(refd)***

**Legislation referred to:**
Rules of Court 2012, O. 32 r. 6, O. 45 rr. 5, 7(7), O. 52 rr. 3, 4

*For the plaintiff - Justin TY Voon (Lee Chooi Peng with him); M/s Justin Voon Chooi & Wing*
*For the 1st & 4th defendants - Clinton Nicholas Gomez; M/s Rajinder Singh Veriah & Co*
*For the 3rd defendant - Victoria Loi Tien Fen; M/s Shook Lin & Bok*

*Reported by Sandra Gabriel*

## JUDGMENT

**Umi Kalthum Abd Majid J:**

### The Application

**[1]** The third defendant applied in encl. 72 and which was filed on 18 April 2013, pursuant to O. 32 r. 6 read together with O. 45 rr. 5 and 7 and O. 52 rr. 3 and 4 of the Rules of Court 2012 for the following orders:

(a) that the *ex parte* order dated 9 August 2012 be set aside forthwith insofar as it relates to the third defendant;

(b) that consequently, the notice of application dated 22 August 2012 encl. 36A be struck out insofar as it relates to the third defendant; and

(c) costs.

### The Facts

**[2]** On 6 October 2011, the learned judge Dato' Azahar bin Mohamed had given judgment in favour of the plaintiff against the first, second, third and fourth defendants for breach of the plaintiff's copyright in some photographs and catalogues, amongst others ("the judgment"). Further, on 25 November 2011, the learned judge gave another order in favour of the plaintiff against the same defendants wherein the learned judge ordered that the mould is to be placed with a third party to be mutually agreed by the parties; the costs of the storage will be borne by the plaintiff with liberty to the plaintiff to apply to recover the storage costs of the mould should the appeal be dismissed ("the order"). The defendant's appeal was dismissed on 17 May 2012 by the Court of Appeal.

**[3]** The plaintiff filed an *ex parte* application for leave to commence committal proceedings against all the defendants *vide* encl. 44 on 19 June 2012. The defendants were alleged to have failed to comply with paras. 2(a) - (d) of the judgment dated 6 October 2011 and order dated 25 November 2011. As such it was alleged that the defendants were in contempt of the same judgment and order.

**[4]** On 9 August 2012, the court granted leave to commence committal proceedings against all the defendants for contempt of the court's judgment and order ("the *ex parte* order").

**[5]** On 22 August 2012, the plaintiff filed the substantive application for contempt of court *vide* encl. 36A.

**[6]** On 18 April 2013, the third defendant filed this encl. 72 to set aside the *ex parte* order. The third defendant stated two grounds in support of this application, they are:

(a) the plaintiff had failed to serve the judgment and the order personally on the third defendant; and

(b) the plaintiff had failed to highlight to this court during hearing on 9 August 2012 that the judgment and order were not served personally on the third defendant when the *ex parte* order was sought for and granted.

## The Decision

**[7]** I dismiss the third defendant's application with costs at RM3,000 which shall be paid within three weeks from 12 July 2013. I do so for the following reasons.

(a) The third defendant had constructive knowledge and notice of the terms of the judgment dated 6 October 2011 and order dated 25 November 2011 notwithstanding that the same were not served on the third defendant personally;

(b) The third defendant's constructive knowledge of the same is evinced by the fact that he and the other defendants had formally applied for a stay of the judgment *vide* summons in chambers dated 13 October 2011. In support of the defendants' application for stay of the same, the third defendant had affirmed an affidavit dated 13 October 2011 on behalf of himself and the other defendants whereby the third defendant had sworn on oath in paras. 5.1(1)-(6) setting out the whole terms of the judgment verbatim;

(c) Further, the third defendant at all material times was represented by solicitors and must have been given legal advice on every step of these proceedings;

(d) I agree with the learned plaintiff solicitor's submission that the third defendant's encl. 72 application is an afterthought. It would appear this application was filed to delay the committal proceedings against the third defendant in encl. 36A. By the third defendant's own action I find that he had waived his right to object to the *ex parte* order dated 9 August 2012. This was because the third defendant had proceeded to file two affidavits in encl. 63 affirmed on 23 January 2013 and encl. 71 affirmed on 2 March 2013 to oppose the plaintiff's application for committal proceedings in encl. 36A. I find that there was no objection raised by the third defendant that the plaintiff had failed to serve the judgment and the order personally on him. The third defendant had also failed to inform the court during case management dated 29 January 2013 and 4 March 2013 in respect of encl. 36A application that the third defendant intended to file this application to set aside the *ex parte* order; and

(e) Moreover, O. 45 r. 7(7) of the Rules of Court 2012 permits the court to dispense with service of a copy of an order under this rule if it thinks it just to do so. In this instance, I am of the view that personal service of the judgment and the order on the third defendant is dispensed with in view of the third defendant's obvious earlier knowledge of them when he had affirmed his affidavit dated 13 October 2011 (see *Madlis Azid & Ors v. Chua Yung Kim & Ors* [2013] 2 CLJ 110).